(3)

No. 06-224

Supreme Court, U.S
FILED
FEB 2 - 2007
OFFICE OF THE CLERK

In The

Supreme Court of the United States

DANTA DAVIS,

Petitioner,

v.

DENNIS STRAUB, Warden,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR REHEARING

JOHN R. MINOCK
CRAMER & MINOCK, PLC
Attorney for Petitioner
339 E. Liberty, Suite 200
Ann Arbor, MI 48104
734-668-2200

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

PETITION FOR REHEARING FROM DENIAL OF PETITION FOR WRIT OF CERTIORARI

Petitioner moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on January 8, 2007, and (2) granting the petition. In the alternative, Petitioner requests that this Court hold the petition in abeyance pending decision of a case pending before the Court, *Roper v. Weaver*, No. 06-313, scheduled for argument on March 21, 2007, on the same underlying issue.

The petition in this case presents the issue what constitutes "clearly established federal law" under 28 USC 2254(d)(1). As Petitioner demonstrated, the decisions of the various Circuit Courts are in conflict regarding how to determine what constitutes "clearly established federal law," and this Court's decisions to date have not provided enough guidance to the federal district and appellate courts which regularly grapple with determining what constitutes clearly established law.

In this case, the Sixth Circuit took the narrowest possible approach to interpretation of the AEDPA standard: the panel majority looked first to see if there was a factually identical Supreme Court case, predictably found none, and held there was no clearly established law on the issues. That approach erroneously conflates the "contrary to" and "unreasonable application" clauses of §2254, and cedes to state courts the authority to interpret the Constitution in violation of Article III.

AEDPA does not limit relief to cases factually identical to decisions of this Court. A decision is "contrary to" federal law established by the Supreme Court if it is a decision reaching a different result from the result reached

by the Supreme Court on facts that are materially indistinguishable. *Williams v. Taylor*, 529 U.S. 362, 406, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Whether a state court's ruling involved an unreasonable application of controlling precedent from the Supreme Court is a different question: the two clauses must be given independent meaning. *Id.* at 529 U.S. 405, 120 S.Ct. 1495. General principles may be applied to a wide range of fact settings, and "[a]pplying a general standard to a specific case can demand a substantial element of judgment." *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004). The test is whether the application is "objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 76, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003).

Reading the "unreasonable application" clause to require the facts between cases be on all fours conflates it with the "contrary to" clause. The panel majority here failed to give the clauses independent meaning. Instead, the majority looked first at the facts of the case, extracted the narrowest possible legal rule to fit that situation, and then, predictably finding no factually identical Supreme Court precedent, found there is no clearly established law. That approach does not comply with this Court's prior decisions. Where a state court "unreasonably refuses to extend [a legal] principle to a new context where it should apply," an unreasonable application of clearly established federal law occurs. *Williams*, 529 U.S. at 407, 120 S.Ct. 1495; *Wiggins v. Smith*, 539 U.S. 510, 520, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

The issue what constitutes clearly established federal law under AEDPA was touched on only briefly in this

Court's recent decision in *Carey v. Musladin*, ___ U.S. ___ (Docket No. 05-785, 12/11/06).

Just before *Musladin* was decided, this Court granted *certiorari* in another case posing the issue what is clearly established federal law, *Roper v. Weaver*, *supra*. The question posed in *Roper* is whether the Circuit Court erred in holding that this Court's decision in *Darden v. Wainwright* that an inflammatory civic duty argument violated due process, if made at trial by the prosecutor, constitutes clearly established federal law where the same impermissible civic duty argument was made at the penalty phase. To resolve the issue, this Court will very likely clarify the issue what constitutes clearly established federal law.

The issue posed in this case is the same as in *Roper*, though from the opposite perspective (in *Roper*, the petitioner was successful below, and the state's petition for writ of certiorari was granted). Nonetheless, the decision in *Roper* will likely affect the outcome in this case, and, depending on the outcome, remand to the Sixth Circuit for reconsideration of this case under the decision in *Roper,* or a grant of certiorari, are foreseeable appropriate remedies.

CONCLUSION

For the foregoing reasons, as well as those contained in the petition for writ of certiorari and in Petitioner's Reply Brief, the petition for rehearing should be granted, the petition for writ should be granted, and petitioner respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit. Alternatively, Petitioner requests that this Court

hold the petition in abeyance pending this Court's decision in *Roper v. Weaver*.

Respectfully submitted,

JOHN MINOCK
CRAMER & MINOCK, PLC
Attorney for Petitioner Danta Davis
339 E. Liberty, Suite 200
Ann Arbor, MI 48104
(734) 668-2200

CERTIFICATE OF COUNSEL

I hereby certify that this Petition for Rehearing is submitted in good faith and not for delay. This Petition for Rehearing is restricted to the grounds set out in Rule 44.2.

_____

JOHN MINOCK